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No. 91-295

Supreme Court, U.S.
FILED
OCT 21 1991
OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1991

CHARLES M. DOYLE, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the Claims Court may award interest against the United States in exercising its discretion to award "liquidated damages" under the Fair Labor Standards Act of 1938, 29 U.S.C. 201 *et seq.*

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A11) is reported at 931 F.2d 1546. The opinion of the United States Claims Court (Pet. App. A14-A40) is reported at 20 Cl. Ct. 495. The order of the Claims Court denying reconsideration (Pet. App. A41-A44) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 30, 1991. A petition for rehearing was denied on May 23, 1991. Pet. App. A12-A13. The petition for a writ of certiorari was filed on August 19, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioners are federal law enforcement personnel and firefighters. They received lump-sum, retroactive payments from the federal government for overtime due under the Fair Labor Standards Act of 1938 (FLSA or Act), 29 U.S.C. 201 *et seq.* They then brought this action to recover liquidated damages under the Act. The Claims Court held that petitioners were not entitled to mandatory liquidated damages, nor were they entitled to a discretionary award of interest on the payments they had received. Pet. App. A14-A40. The court of appeals affirmed. Pet. App. A1-A11.

1. As amended in 1974, the FLSA authorized overtime pay for federally employed law enforcement officials and firefighters, beginning on January 1, 1978. Pub. L. No. 93-259, § 6(c)(1)(A), 88 Stat. 60. Pursuant to the provision in the 1974 amendments for calculating overtime, the Secretary of Labor conducted a study to determine the average number of hours that law enforcement officials and firefighters worked. See 29 U.S.C. 207(k). The Secretary's initial study was successfully challenged in two actions to which petitioners were not parties. *Jones* v. *Donovan*, 25 Wage & Hour Cas. (BNA) 380, 391 (D.D.C. 1981), aff'd mem., 675 F.2d 1340 (D.C. Cir. 1982); *Lanehart* v. *Marshall*, 26 Wage & Hour Cas. (BNA) 1654 (D. Md. 1984). Thereafter, the Secretary performed a new study and published revised overtime standards.

On September 22, 1983, the Office of Personnel Management (OPM) directed federal agencies to use the Secretary's revised standards to calculate overtime due under the 1974 FLSA amendments. In late 1983, various federal agencies began making lump-sum payments, retroactive to January 1, 1978, to

all federal law enforcement officials and firefighters. The payments made pursuant to OPM's directive did not include interest or liquidated damages.[1] Pet. App. A3.

2. Seven firefighters, none of whom were parties to the prior litigation, filed suit in the United States District Court for the Eastern District of New York seeking liquidated damages pursuant to Section 16(b) of the FLSA, 29 U.S.C. 216(b). *Cook* v. *United States*, No. CV85-1467.[2] Pet. App. A3. On appeal of the dis-

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[1] Interest was included in the overtime payments made to the plaintiffs in *Jones* and *Lanehart*. In each case, the district court refused to award plaintiffs mandatory liquidated damages under 29 U.S.C. 216(b), because the government had demonstrated a good faith and reasonable belief that its actions did not violate the FLSA. When an employer establishes good faith and reasonable grounds for its violations, the Act prohibits an award of mandatory liquidated damages under Section 216(b) but permits the court, in its discretion, either to "award no liquidated damages" or to "award any amount thereof not to exceed the amount specified in section 216," 29 U.S.C. 260. The courts in *Jones* and *Lanehart* relied on Section 260 to award interest on the overtime due to the plaintiffs. *Jones* v. *Donovan*, 26 Wage & Hour Cas. (BNA) 1602, 1605 (D.D.C. 1984); *Lanehart*, 26 Wage & Hour Cas. (BNA) at 1655. Neither court discussed whether the federal no-interest rule barred an award of interest, and neither decision was appealed. In the present case, the Claims Court held that the government was not collaterally estopped from relitigating the issue whether interest may be awarded under Section 260. Pet. App. A33-A37. Petitioners did not seek review of that holding in the court of appeals, nor do they raise the issue in this Court.

[2] 29 U.S.C. 216(b) provides in relevant part:

> Any employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their

trict court's entry of partial summary judgment, the Federal Circuit held that the action was governed by the FLSA's two-year statute of limitations because the Government's actions had not been willful. *Cook* v. *United States*, 855 F.2d 848, 849-850 (Fed. Cir. 1988); see also 29 U.S.C. 255(a) (prescribing three-year limitations period for willful violations and two-year period for all other violations). The court of appeals further held that the limitations period began running on September 22, 1983—the date of OPM's directive—for claims based on pay periods prior to that date. 855 F.2d at 851. The court observed that claims for prior pay periods would be barred with respect to those plaintiffs who joined the action after September 22, 1985, unless it was determined on remand that the statute of limitations should be tolled. *Ibid.*[3] The court determined that the statute of limitations on claims, "if any," for pay periods after September 22, 1983, would commence at the end of the pay periods. *Ibid.* The court remanded the case for a determination of which claims, if any, had been timely asserted. *Id.* at 852.

> unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. * * * An action to recover [liquidated damages] may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. * * *

[3] In a prior interlocutory appeal, the court of appeals had upheld a discovery order designed to identify additional potential plaintiffs, many of whom subsequently joined the litigation. See *United States* v. *Cook*, 795 F.2d 987 (Fed. Cir. 1986).

On remand, the district court transferred the claims of the remaining plaintiffs for consolidation with the present action. Ultimately, all of the *Cook* plaintiffs were dismissed from the litigation. Pet. App. A4-A5.

3. Petitioners filed their complaint in the present action on November 14, 1985. Pet. App. A20. On cross-motions for summary judgment, the Claims Court addressed "(1) whether the court ha[d] jurisdiction to hear the case; [and] (2) if [so], * * * whether [petitioners] may, should, or should not be awarded liquidated damages under 29 U.S.C. § 216 (b)." *Id.* at A19.

The Claims Court observed that its jurisdiction was at issue because petitioners brought this action more than two years after September 22, 1983, the date on which the *Cook* court had held the cause of action initially accrued. Pet. App. A20. Relying on *Cook*, the Claims Court held that the FLSA's two-year statute of limitations applied in the present case. *Id.* at A21. The court further held that, assuming that the limitations period was subject to equitable tolling, the facts did not justify tolling in this case. *Id.* at A21-A28. Based on those holdings, the court determined that the only claims, if any, that were not time-barred were (1) claims for pay periods after September 22, 1983, asserted by plaintiffs who joined the suit within two years after the end of those pay periods; and (2) claims as to which the limitations period was tolled under Section 205 of the Soldiers' and Sailors' Civil Relief Act, 50 U.S.C. App. 525. Pet. App. A30-A31. The court did not determine which of petitioners' claims, if any, fell into those categories.

The court then held that petitioners were not entitled to liquidated damages under the FLSA. The court initially determined that petitioners could not

recover mandatory liquidated damages under Section 216(b), because the government had established that it had acted in good faith and on a reasonable basis. Pet. App. A32. Nor was a discretionary award of liquidated damages available pursuant to Section 260, the court held. The court noted that the "only basis" on which petitioners sought an award was for the delay in receiving backpay. Pet. App. A37. Petitioners' claims thus implicated the "long-established principle of statutory and federal common law that the government may not pay interest on claims against it unless 'Congress has intended to waive the United States' immunity with respect to interest . . . expressly." *Ibid.* (quoting *Library of Congress* v. *Shaw*, 478 U.S. 310, 318-319 (1986)). The court concluded that, because Congress had not specifically authorized recovery of interest on backpay awards, the court could not award interest in the guise of discretionary "liquidated damages." Pet. App. A38-A39.

4. The court of appeals affirmed. It upheld the Claims Court's determination that the FLSA's two-year limitations period applied and was not subject to equitable tolling. Pet. App. A5-A7. The court of appeals recognized that this holding "render[ed] most of the claims in this case untimely." *Id.* at A7. Nonetheless, because of "the possible existence of claims continuing beyond the statutory limit" (*ibid.*), the court also addressed the availability of liquidated damages.

The court held that the Claims Court's discretion to award liquidated damages under Section 260 of the FLSA "does not extend to a liquidated damages award for interest or delay damages against the United States." Pet. App. A9. The court upheld the Claims Court's determination that, though nominally seeking "liquidated damages," petitioners were "actually

seek[ing] interest or delay damages." *Id.* at A11. The court of appeals observed that under *Library of Congress* v. *Shaw*, *supra*, "Congress must expressly waive the Government's sovereign immunity from suits for interest payments before claimants can recover interest or delay damages." Pet. App. A9. Because "[n]either § 216 nor § 260 expressly waives the Government's sovereign immunity against interest," the court concluded that "*Shaw* bars recovery." *Id.* at A9, A10.

ARGUMENT

Petitioners contend (Pet. 13-18) that the Claims Court may, in exercising its discretion under 29 U.S.C. 260 to award "liquidated damages," award interest against the United States.[4] The court of appeals correctly rejected that contention, and its decision does not conflict with any decisions of this Court or other courts of appeals. Further review is therefore unwarranted.

1. At the outset, we note that in its present posture this case is not suitable for review by this Court. The courts below expressed doubt as to whether any of petitioners' claims were timely, but the courts did not resolve that doubt. As explained above, although the Claims Court "defined" the "groups of claims * * * that are not barred by the statute of limitations" (Pet. App. A31), the court made no findings on which of petitioners' claims, if any, fell into those groups. In the absence of such findings, the court of appeals recognized that there may be no live claims. The court

[4] Petitioners do not seek review in this Court of the court of appeals' holding that the government was not subject to an award of mandatory liquidated damages under 29 U.S.C. 216(b).

of appeals observed that "[t]he trial court's correct decision to apply the two-year statute of limitations renders most of the claims in this case untimely." *Id.* at A7. The court of appeals went on to address the liquidated damages issue based only on "the possible existence of claims continuing beyond the statutory limit." *Ibid.* Thus, the courts below addressed the issue that petitioners seek to present here without resolving the threshold question of whether they had jurisdiction to do so.[5] In light of the unresolved question whether Article III jurisdiction exists, further review is not appropriate.

2. In any event, the court of appeals correctly rejected petitioners' contention that Congress waived the United States' sovereign immunity from interest awards under the FLSA. The court of appeals' decision reflects a straightforward application of the federal "no-interest rule" that this Court applied in *Library of Congress* v. *Shaw*, 478 U.S. 310 (1986).

The no-interest rule is itself straightforward: "In the absence of express congressional consent to the award of interest separate from a general waiver of immunity to suit, the United States is immune from an interest award." *Shaw*, 478 U.S. at 314. By requiring that an award of interest be "affirmatively and separately contemplated by Congress" (*id.* at 315), the no-interest rule "provides an added gloss of strictness" on the principle that waivers of sovereign immunity must be "construe[d] * * * strictly in favor of the sovereign" (*id.* at 318) (internal quotation marks omitted). Accord *Missouri* v. *Jenkins*, 491

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[5] Petitioners do not seek review of the court of appeals' holding that their claims are governed by the FSLA's two-year statute of limitations and that the two-year period is not subject to equitable tolling.

U.S. 274, 281 n.3 (1989) (federal no-interest rule is an "ultrastrict rule of construction"). The "broad proscription of interest awards against the United States" (*Missouri* v. *Jenkins*, 491 U.S. at 281 n.3) recognizes that "[w]hen Congress has intended to waive the United States' immunity with respect to interest, it has done so expressly," *Shaw*, 478 U.S. at 318; see also *id.* at 318 n.6 (citing statutes expressly providing for awards of interest).[6]

The court of appeals correctly applied the no-interest rule to conclude that "[t]he FLSA does not waive immunity for suits against the Government for interest." Pet. App. A11. As the court of appeals recognized, neither of the two provisions governing recovery of backpay under the FLSA refers to interest. *Id.* at A9. Sections 216 and 260 of Title 29 refer only to awards of liquidated damages, not awards of interest.[7] As the Claims Court recognized,

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[6] The no-interest rule applies by statute to actions brought in the Claims Court. 28 U.S.C. 2516(a); see also *Shaw*, 478 U.S. at 317. While the Tucker Act, 28 U.S.C. 1491, grants the Claims Court jurisdiction to entertain claims for liquidated damages, the Act "does not create any substantive right enforceable against the United States for money damages." *United States* v. *Mitchell*, 463 U.S. 206, 216 (1983) (internal quotation marks omitted). Thus, the Tucker Act does not waive the United States' immunity from awards of interest.

[7] Petitioners cite (Pet. 13-14) several provisions in addition to Sections 216 and 260, none of which are relevant to the question presented here. Sections 203(e)(2) and 203(x) of Title 29 simply provide that governmental employees and employers, respectively, are covered under the FLSA. Sections 204(f) refers to the right of federal employees to bring actions for liquidated damages under Section 216(b). There is no dispute that, as federal employees, peti-

"[t]here may well be other reasons" that would justify a discretionary award of liquidated damages under Section 260, but in light of the no-interest rule a discretionary award may not be based on a claim for interest. *Id.* at A37. Because "the only basis upon which [petitioners] argue[d] for liquidated damages" was for the delay in receiving back pay (*ibid.*), the courts below properly held that recovery of liquidated damages was barred.[8]

Petitioners contend (Pet. 16-18) that an intent to waive immunity from interest can be inferred from Congress's waiver of immunity from liquidated damages. They argue that, by authorizing mandatory liquidated damages in an amount equal to the amount of backpay, Congress evidenced an intent to ensure complete compensation for delay. Pet. 18 n.5. To support that argument, petitioners rely (Pet. 16-17) on *Brooklyn Savings Bank* v. *O'Neil*, 324 U.S. 697 (1945). There, this Court held that employees of private employers could not waive their right to recover mandatory liquidated damages under Section 216(b). 324 U.S. at 704. In so holding, the Court stated that, by requiring an award of damages equal to the amount of backpay withheld, Congress intended

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tioners were entitled to assert timely claims for liquidated damages. The question is whether they may recover interest in the guise of discretionary liquidated damages.

[8] Petitioners do not dispute the determinations by both courts below that petitioners' only basis for seeking liquidated damages was for the belated receipt of backpay. See Pet. App. A11, A37. Nor could petitioners dispute these determinations. In seeking reconsideration by the Claims Court, petitioners expressly argued that "the only reason for the award of discretionary liquidated damages against the government is to compensate plaintiffs for delay or as the equivalent of interest." *Id.* at A42.

to provide a compensatory remedy, since there could be "damages too obscure and difficult of proof for estimate other than by liquidated damages." *Id.* at 707.[9] But a waiver of immunity from interest cannot be inferred from evidence of a broad compensatory purpose.

In applying the no-interest rule, this Court has consistently rejected arguments based on evidence that Congress intended to ensure complete compensation. The Court has also made clear that awards of interest must be treated differently from other types of recovery when recovery is sought from the federal government. In *Shaw*, the Court refused to infer an intent to allow interest on attorney's fees from a provision in Title VII authorizing "reasonable" attorney's fees. 478 U.S. at 320-321. The Court in *Shaw* found "no basis for reading the term 'reasonable' as the embodiment of a specific congressional choice to include interest as a component of attorney's fees." *Id.* at 320. In other cases, the Court has similarly refused to find that Congress waived immunity from interest by authorizing recovery of "just com-

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[9] When *Brooklyn Savings Bank* was decided, only mandatory liquidated damages were available under the FLSA, and only private employers were subject to the Act. The provision authorizing discretionary awards, now codified at 29 U.S.C. 260, was enacted as part of the Portal-to-Portal Act of 1947, ch. 52, § 11, 61 Stat. 89. The FLSA was extended to federal employers by the Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, 88 Stat. 55. Thus, the decision in *Brooklyn Savings Bank* stands only for the principle that Congress intended employees of private employers to be compensated fully through recovery of mandatory liquidated damages. As discussed in the text, *infra*, that principle cannot be relied upon to overcome the force of the federal no-interest rule.

pensation," *e.g.*, *United States* v. *Tillamooks*, 341 U.S. 48, 49 (1951), or the "amount equitably due," *Tillson* v. *United States*, 100 U.S. 43, 45, 47 (1879). These decisions fully support the court of appeals' conclusion in this case that no intent to waive immunity from interest can be inferred from the congressional authorization for recovery of "liquidated damages."

Petitioners' reliance on decisions that involve private employers, such as *Brooklyn Savings Bank*, *supra*, is misplaced. The statute at issue in *Shaw* directed that the United States' liability for costs, including attorney's fees, should be "the same as a private person['s]," 42 U.S.C. 2000e-5(k). See 478 U.S. at 313. The court of appeals in *Shaw* had upheld recovery from the United States of interest on an award of attorney's fees, relying on the fact that interest could be recovered from private parties. *Id.* at 313-314. In reversing the court of appeals' decision, this Court observed that "[t]he purpose of the [no-interest] rule is to permit the Government to 'occupy an apparently favored position.'" *Id.* at 315-316 (quoting *United States* v. *Verdier*, 164 U.S. 213, 219 (1896)). The Court in *Shaw* accordingly concluded that the statutory language equating the liability of the United States to that of a private party "waives the Government's immunity from attorney's fees, but not interest." 478 U.S. at 319.[10]

In sum, petitioners err in relying on evidence of the broad compensatory purposes underlying the manda-

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[10] Petitioners' reliance (Pet. 19-21) on legislative history is misplaced. Here, as in *Shaw*, neither the statute nor the legislative history contains any reference to interest. See Pet. App. A42-A43; cf. *Shaw*, 478 U.S. at 319-320.

tory liquidated damages provision in Section 216(b). That evidence cannot substitute for the express waiver of immunity from interest required under the no-interest rule. Because Section 260 does not expressly authorize a discretionary award of interest, the court of appeals correctly concluded that the no-interest rule bars recovery.

3. The court of appeals' decision does not conflict with that of any other court of appeals. Petitioners' contrary contention (Pet. 19-23) is based on their misstatement of the court of appeals' holding in this case.

The court of appeals held that the Claims Court's discretion to award "liquidated damages" under 29 U.S.C. 260 "does not extend to a liquidated damages award for interest or delay damages against the United States." Pet. App. A9. The court's holding does not totally bar recovery of liquidated damages by federal employees, as petitioners assert (Pet. 12). For one thing, the holding concerns only discretionary awards of liquidated damages under Section 260, not mandatory awards under Section 216(b). Moreover, the decision does not affect claims for discretionary awards, except to the extent such claims seek interest. Pet. App. A11. Thus, nothing in the decision forecloses discretionary awards for other types of damages that can be directly traced to statutory violations.[11]

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[11] It appears that the scope of damages that can be recovered under Section 260 is an issue that has not been widely litigated. With the exception of the district court decisions in *Jones* and *Lanehart*, we are not aware of any decisions involving awards under Section 260 against public employers. Nonetheless, we agree with the Claims Court's statement in this case that discretionary awards under Section 260 may be justified for "other reasons" than to com-

The decisions that petitioners cite (Pet. 22) do not conflict with the decision here, because they concern mandatory imposition of double damages under Section 216(b), not discretionary awards under Section 260. Thus, none of those decisions addresses the issue here: whether a court may exercise its discretion under Section 260 to allow recovery of interest from a public employer.[12] In *Thompson* v. *Sawyer*, 678 F.2d 257, 267, 282 (D.C. Cir. 1982); *Pearce* v. *Wichita County*, 590 F.2d 128, 134 (5th Cir. 1979), and *Morgado* v. *Birmingham-Jefferson County Civil Defense Corps*, 706 F.2d 1184, 1187-1189 (11th Cir. 1983), cert. denied, 464 U.S. 1045 (1984), the courts of appeals upheld awards of mandatory liquidated damages against government employers under Section 216(b); in each case, the award was based on the district court's determination that the employer failed to demonstrate under Section 260 that its actions in violation of the relevant statute were in good faith and had a reasonable basis.[13] In *Joiner* v. *City*

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pensate employees for the loss of the investment use of backpay. See Pet. App. A37. Cf. *Rex Trailer Co.* v. *United States*, 350 U.S. 148, 153-154 (1956) (describing types of losses that government could recover under "liquidated damages" provision).

[12] The only decision that petitioners cite involving a federal employer is *Thompson* v. *Sawyer*, 678 F.2d 257 (D.C. Cir. 1982). Pursuant to the Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, Tit. I, § 127(a), 96 Stat. 37, the Federal Circuit now has exclusive jurisdiction over compensation disputes involving federal employees brought in district courts pursuant to 28 U.S.C. 1346(a)(2). See 28 U.S.C. 1295(a)(2).

[13] The court in *Thompson* indicated in dicta that under Section 260 a court may award discretionary liquidated damages against a public employer, but the court did not address

of Macon, 814 F.2d 1537, 1539 (11th Cir. 1987), the district court failed to determine whether the government employer had a good faith and reasonable belief that its conduct did not violate the relevant statute, and based on that failure the court of appeals reversed the district court's refusal to award mandatory liquidated damages. In *EEOC* v. *City of Detroit Health Dep't*, 920 F.2d 355, 357-358 (6th Cir. 1990), the court of appeals reversed the district court's determination that the government employer had acted in good faith and on reasonable grounds, because that determination conflicted with the jury's finding that the statutory violation was willful. In light of the jury's finding, the court of appeals in *City of Detroit Dep't* held that a mandatory award was required. *Id.* at 358. Finally, in *Blanton* v. *City of Murfreesboro*, 856 F.2d 731, 737 (6th Cir. 1988), the court of appeals reversed an award of mandatory liquidated damages under Section 216(b) because the lower court applied the wrong legal standard in making the award.

Because the decisions on which petitioners rely involve mandatory awards of liquidated damages in an amount prescribed by statute, they are inapposite. Petitioners fail to establish a conflict among the circuits with respect to the question presented here.

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whether such an award could take the form of interest. 678 F.2d at 282.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER 1991

☆ U. S. GOVERNMENT PRINTING OFFICE: 1991 312324 45128